

HOWARD COUNTY ETHICS COMMISSION
3430 Courthouse Drive
Ellicott City, Maryland 21043

December 8, 2021

ADVISORY OPINION NO. 2021-05

The Howard County Ethics Commission (“Commission”) has received a request for an Advisory Opinion in which the Requestor has inquired about whether under the Howard County Public Ethics Law, Howard County Code Section 22.200 et seq. (the “Ethics Law”) a potential conflict exists with her County employment as a result of her position as a Board member for the Community Ecology Institute. The Commission finds that the Requestor’s service as a Board Member for the Community Ecology Institute is not in conflict with her County employment so as long as she abides by the restrictions as set forth herein.

I. BACKGROUND

The Requestor is employed by the County’s Office of Community Sustainability, which is an office within the Department of County Administration (the “Community Sustainability”). Community Sustainability aims to protect and enhance the quality of life in our communities by addressing environmental and economic issues affecting County citizens and future generations. The Requestor holds a staff position in Community Sustainability and assists County departments and offices to save energy, reduce greenhouse gas emissions and transition renewable energy sources for Howard County government operations. Requestor also works with County residents, companies and other constituents with energy conservation projects and education outreach about such topics. While Requestor does obtain and oversee funds received by the County primarily from the State, she does not manage, advise, review or otherwise participate in any policy decisions regarding which entities Community Sustainability, or the County, supports and does not have any budgetary duties.

The Community Ecology Institute (the “Institute”) is a 501(c)(3) non-profit organization with a mission to enhance community health and well-being by fostering connections between people and the natural world, helping people and nature thrive together. The grassroots organization started with a focus on engaging families and children with nature. In 2019, the organization expanded its scope with the purchase of a 6-acre farm in Columbia and began various farm-based initiatives include using organic farming methods to grow food for people in need and to engage diverse partners and traditionally underserved communities in these efforts. Further, at the farm, the Institute addresses climate change and numerous important ecological practices. The Institute has received grants from Howard County, through Community Sustainability. The County’s interaction with the Institute is growing due to its expanded commitment in the County.

The Requestor joined the Board of Directors for the Institute in April 2019 and was

voted in as Vice President of the Board in January 2020, for a two-year term. In the future, Requestor intends to stay on the Board but not as Vice President past this current term. As a Board member, Requestor attends monthly Board meetings, assists with development of policies and procedures for the Institute, helps set and oversee the Institute's budget, helps keep the Institute focused on mission, and reviews performance and compensation of staff. Requestor also volunteers for various projects at the Institute's farm and assists with fundraising efforts, such as membership and major donor campaigns. Importantly, Requestor advises the organization on best practices for energy conservation, energy efficiency, and renewable energy sources.

At the hearing before the Commission on November 4, 2021, the Requestor testified regarding her duties required by her County position and her efforts as a Board member of the Institute. Further, the Director of Community Sustainability was present to answer any questions posed by the Commission and he stated that he did not see an issue with the Requestor serving as a Board member for the Institute but was appreciative that Requestor was seeking parameters from the Commission. The Requestor volunteered that she would recuse herself as required, including from any conversations, issues and/or processes between the County and the Institute and would not solicit any donations or funding from the County on behalf of the Institute. Further, in her role with the Board, she would recuse herself from any discussions, requests, an/or issues related to the County, including, most importantly, from any County funding issues.

II. THE LAW

Sec. 22.201. - Statement of purpose and policy.

- (a) Howard County, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and employees, finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and employees will be maintained.

Sec. 22.204. - Prohibited conduct and interests.

- (a) *Participation Prohibitions.*
 - (1) Except as permitted by Commission regulation or opinion, an official or employee may not participate in:
 - (i) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision of the matter, any matter in which, to the knowledge of the official or employee, the official

or employee or a qualified relative of the official or employee has an interest.

- (ii) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision with respect to the matter, any matter in which any of the following is a party:
 - a. A business entity in which the official or employee has a direct financial interest of which the official or employee may reasonably be expected to know;
 - b. A business entity for which the official, employee, or a qualified relative of the official or employee is an officer, director, trustee, partner, or employee;
 - c. A business entity with which the official or employee or, to the knowledge of the official or employee, a qualified relative is negotiating or has any arrangement concerning prospective employment;
 - d. If the contract reasonably could be expected to result in a conflict between the private interests of the official or employee and the official duties of the official or employee, a business entity that is a party to an existing contract with the official or employee, or which, to the knowledge of the official or employee, is a party to a contract with a qualified relative;
 - e. An entity, doing business with the County, in which a direct financial interest is owned by another entity in which the official or employee has a direct financial interest, if the official or employee may be reasonably expected to know of both direct financial interests; or
 - f. A business entity that:
 - 1. The official or employee knows is a creditor or obligee of the official or employee or a qualified relative of the official or employee with respect to a thing of economic value; and
 - 2. As a creditor or obligee, is in a position to directly and substantially affect the interest of the official or

employee or a qualified relative of the official or employee.

(b) *Employment and Financial Interest Restrictions.*

(1) Except as permitted by regulation of the commission when the interest is disclosed or when the employment does not create a conflict of interest or appearance of conflict, an official or employee may not:

- (i) Be employed by or have a financial interest in any entity:
 - a. Subject to the authority of the official or employee or the County agency, board, commission with which the official or employee is affiliated; or
 - b. That is negotiating or has entered a contract with the agency, board, or commission with which the official or employee is affiliated; or
- (ii) Hold any other employment relationship that would impair the impartiality or independence of judgment of the official or employee.

(2) The prohibitions of paragraph (1) of this subsection do not apply to:

- (i) An official or employee who is appointed to a regulatory or licensing authority pursuant to a statutory requirement that persons subject to the jurisdiction of the authority be represented in appointments to the authority;
- (ii) Subject to other provisions of law, a member of a board or commission in regard to a financial interest or employment held at the time of appointment, provided the financial interest or employment is publicly disclosed to the appointing authority and the Commission;
- (iii) An official or employee whose duties are ministerial, if the private employment or financial interest does not create a conflict of interest or the appearance of a conflict of interest, as permitted and in accordance with regulations adopted by the Commission; or
- (iv) Employment or financial interests allowed by regulation of the Commission if the employment does not create a conflict of interest or the appearance of a conflict of interest or the financial interest is disclosed.

...

(e) *Use of Prestige of Office.*

- (1) An official or employee may not intentionally use the prestige of office or public position for the private gain of that official or employee or the private gain of another.
- (2) This subsection does not prohibit the performance of usual and customary constituent services by an elected official without additional compensation.

III. ISSUE

Does the Requestor's participation on the Board present a conflict or an appearance of a conflict under the Ethics Law?

IV. DISCUSSION

A. Employment Prohibition:

The Ethics Law precludes simultaneous employment for an official with an entity that is subject to official authority of the covered employee or the authority of the Howard County agency, board or commission with which the Requestor is affiliated. To be consistent with prior Opinions of the Commission, the term "employment" is construed broadly to effectuate the purposes of the ethics law. (See Opinion Nos. 12-05, 07-04, 06-01, 01-00; 20-01 and State Opinions 02-02, 87-01, 86-16).

On multiple occasions, this Commission has construed the employment provision broadly to include affiliation that does not result in monetary compensation. Volunteer service on management or operational boards of charitable organizations or professional associations has been analyzed as an employment interest. (See Opinions 06-01; 01-00; 20-01).

The fact that employment is non-compensated is immaterial, if the employee holds a "position of trust." The Commission looks to the substance of the employee's relationship with the outside entity rather than to the existence or amount of compensation. If the employee holds an office, directorship, or other position of trust with an entity subject to the authority of, or having contractual dealings with the employee's agency into which he would reasonably be expected to have a personal loyalty or commitment to the goals of that entity, then holding the position may be prohibited by the ethics law.

Given the responsibilities of the Board of the Institute, there is no question that a

Board member would hold a “position of trust.” Members of the Board of the Institute have responsibilities, including oversight and approval of programs.

Properly treated as employment in a position of trust, the Board position may be prohibited employment under the Ethics Law, only if the Institute is subject to the authority of Community Sustainability, the County agency in which the Requestor is employed. While the Institute is not directly under the authority of Community Sustainability, there may be specific areas of conflict arising in the course of the Requestor’s fulfillment of the dual roles. To ensure that no conflict arises, or an appearance of a conflict, the Commission has outlined various restrictions herein.

C. Prohibited Participation

Section 22.204(a)(1) prohibits an official from participating officially, except in a non-ministerial or administrative way, in any matter that would, to her knowledge, have a direct financial impact, as distinguished from the public generally, on herself or certain relatives or upon any business interest with which they are affiliated. “Matter” includes any decision, proceeding, application, submission, request for ruling or other determination, contract, claim, case or such particular matter that would involve some discrete and particularized impact on the employee or official, or which involves, as a party, an entity with which the official or employee or certain relatives are affiliated. (See Opinion Nos. 07-04, 06-01, 01-00, 96-03, 97-03, 97-04 and 20-01.)

There is no question that in this situation a “matter” would include any participation between the Institute and the Requestor’s appointing authority. The Commission has consistently construed the relationship with the business entity under the employment provision of the Ethics Law to include a non-compensated interest when the official holds a position of trust. The Requestor is one of thirteen members of the Board of the Institute and has the ability to make managerial and policy decisions. Thus, participation would not be merely ministerial or administrative.

The Ethics Law is to be construed liberally to effectuate its purpose and policy, including the advancement of the continued trust and confidence of the citizens of Howard County in “the impartiality and independent judgment of public officials and employees” Section 22.201(a). Thus, in focusing on the substance of the Requestor’s relationship with the Institute, participation would be barred under Section 22.204(a)(1) in those instances in which the Requestor, in her role within Community Sustainability, had involvement or the necessity to collaborate or otherwise be involved with the Institute.

D. Disclosure of Confidential Information

Section 22.204(e) prohibits officials from disclosing or using for their own gain or that of another, confidential information acquired in fulfillment of their public role. It will be necessary for the Requestor to avoid both affirmative and inadvertent disclosure of confidential information. Obviously, the Requestor would not be free to discuss matters brought to her attention in her County employment, nor could she discuss confidential Institute matters with her appointing authority or other County employees.

E. Appearance of Conflict/Inconsistent Employment

Under prior decisions of the Ethics Commission, we will consider an appearance of conflict as a use of prestige of office which is prohibited under the Ethics Law. *See* Section 22.204(d). *See also* Op. Nos. 12-05; 07-05; 04-02. One type of appearance of conflict is deemed "inconsistent employment." Inconsistent employment arises when a situation raises clear and serious conflict of interest issues, but in which specific authority or contractual affiliations set forth in 22.204(b) are not present. *See* Op. No. 07-05. Even if the connection between the Requestor's County employment and her service on the Board is not deemed an "affiliation," barring the official's employment under 22.204(b)(1)(iii), it is, at a minimum, employment that has the potential for creating an appearance of a conflict.

The Ethics Commission typically looks to the following non-cumulative list of factors to determine whether a relationship is inconsistent employment:

- (1) How the employment was acquired;
- (2) Whether the employment was obtained on County time;
- (3) How the subject matter of the activity relates to County duties;
- (4) Whether outside activity derives from work performance or relationships that occur in connection with County responsibilities;
- (5) Whether some aspect of the County job would be impacted by the employment relationship; and
- (6) Whether the employer would feel pressured or perceived an advantage in County dealings because of its hiring of the County employee.

See Op. Nos. 12-05; 07-05.

In considering the factors, the Commission does not think any potential conflicts, or appearances of a conflict, rise to the level that would negate the Requestor's ability to sit on the Board of the Institute. The Requestor stated that she is interested in environmental issues, community outreach and has a desire to serve her community. The Requestor has been asked to serve due to her interest and expertise in renewable energy and ecological practices. There are no facts to suggest that this position on the Institute's Board arose as a direct result of her County employment. The Requestor's job duties do include environmental issues, but do not include any budgetary policy decisions.

Admittedly, the Requestor's position with the County and the Institute may both involve community relationships and it is impossible to say that there could never be any overlap between the Requestor's County position and her volunteer position on the Board for the Institute. The contacts and relationships in her County position will not necessarily be the same as those in her role with the Institute but could, due to the subject matter, overlap. Therefore, the Commission believes that with the exceptions outlined herein, there is no issue with the Requestor's Board position.

Further, the Commission considered whether the employment relationship between the Requestor's County position and the Institute volunteer position creates a perception that County government has an advantage in dealings with the Institute. Arguably, her volunteer position has no impact on her County employment because the Requestor is not in a policy making, managerial or budgetary role with the County. She is not involved in policy decisions that implicate or involve the Institute directly. Specifically, she is not involved in funding decisions related to the Institute by the County, or any other funding or budgetary decisions for the County. Moreover, the Institute has staff who may confer with the County officials, not necessarily individual Board members.

With regard to the final factor, the Commission considered whether the Institute has a perceived advantage in County dealings due to the Requestor's Board membership. There is a continuing risk that citizens could perceive an advantage due to the Requestor's position with the County. However, it is clear that the Requestor's role within the County has no influence on any County budgetary involvement with the Institute. The Institute has numerous Board members with ties to the community. This alone is not sufficient to rise to the level of a potential conflict.

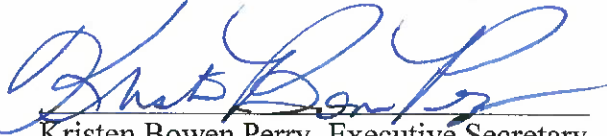
V. CONCLUSION

The Commission appreciates the Requestor's dedication to the community and her pursuit to enhance and teach the importance of environmental support. Her willingness to serve as a volunteer with the Board of the Institute is commendable. Due to the overlap in subject matter between Requestor's volunteerism with the Institute and her County employment with Community Sustainability, and the potential risk that the community could perceive an advantage due to Requestor's dual involvement, the Commission believes it is important that Requestor clearly sets up a firewall between her Board position and her County position. For the reasons stated, the Requestor's service on the Board of the Institute is not in conflict with her County employment, with the following restrictions:

- 1) In order to eliminate any potential for a conflict or appearance of a conflict, the Requestor shall avoid participation on *all* issues arising, between the County and the Institute, especially funding/grant/budgetary issues;
- 2) In her capacity as a Board member, Requestor shall not participate in any grant work related to the County, including but not limited to formulating, drafting or otherwise participating in any proposals for grants or contracts from the County;
- 3) Requestor shall not fundraise or seek donations for the Institute from any County employee or official or from any people or entities that do business with Community Sustainability and the County;
- 4) Requestor must recuse herself from participation in any County projects related to the Institute, including but not limited to documentation related to any grants; and
- 5) Requestor shall recuse herself from any joint events with the Institute and the County.

Should Requestor's position and/or roles within the County change, the Requestor should seek additional guidance from the Commission.

HOWARD COUNTY ETHICS COMMISSION

By: 

Kristen Bowen Perry, Executive Secretary
on behalf of the Howard County Ethics
Commission

Charles Fuller, Chairperson
Joanne Drielak, Vice Chairperson
Jonathan Kromm
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Jean Xu*

*Jean Xu was not present at the meeting discussing this Advisory Opinion and did not participate in the decision.